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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANABI OIL CORPORATION, Plaintiff and Appellant, v. HIGHLAND PARK OIL, INC. et. al., Defendants and Respondents.	B283511 Los Angeles County Super. Ct. No. BC495569

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Kenneth P. Roberts, Ryan B. Tish, and Kevin Y. Kanooni for Plaintiff and Appellant.

John P. Fitzmorris for Defendant and Respondent Atabak Youssefzadeh.

INTRODUCTION

California law favors the enforcement of liquidated damages clauses in commercial contracts, but as with other contract terms, courts will only enforce the agreement the parties actually made. In 2009, defendant and respondent Highland Park Oil, Inc. (Highland Park) signed a retail sales agreement (RSA) with Shell Oil (Shell), in which Shell promised to supply, and Highland Park promised to buy, a minimum number of gallons of gasoline. The RSA provided that if either party terminated the contract early, Highland Park would be liable for liquidated damages of 3 cents per gallon on all unpurchased gasoline. In 2010, Shell assigned the RSA to plaintiff and appellant Anabi Oil Corporation (Anabi). Anabi sold gas to Highland Park until 2012, when Highland Park went out of business. Anabi sued Highland Park and its owners, including defendant and respondent Atabak Youssefzadeh, for breach of contract and breach of personal guaranty—but never formally terminated the RSA. After a 24-day bench trial, the trial court held that Anabi did not prove its breach of contract cause of action because, among other things, it did not trigger the liquidated damages clause. Anabi appeals.

We agree with the court below that Anabi did not trigger the contract's liquidated damages clause because it didn't terminate the RSA and that Anabi failed to prove actual damages. Because damages are a required element of a breach of contract claim—and because the existence of a debt is a prerequisite for a claim of breach of personal guaranty—we affirm.

BACKGROUND

1. Facts

This case involves a Shell-branded gas station located at 5137 North Figueroa Street in Los Angeles.

On June 1, 2006, Abdul Ibrahim entered into a RSA and lease with Shell in which Ibrahim agreed to purchase gasoline and diesel fuel. Intending to acquire the lease and RSA from Ibrahim, in January 2008, Youssefzadeh incorporated Highland Park with defendants Mizan Bhuiyan and Azam Khan. Ibrahim agreed to sell the business to Highland Park, but Shell's approval was required—and Shell required the would-be owners/operators to personally guarantee Highland Park's debts. Youssefzadeh signed his guaranty on February 27, 2008.

On April 1, 2008, Ibrahim assigned the 2006 RSA and lease to Highland Park. Highland Park then signed an identical RSA with Shell, and began operating the station. The RSA required Highland Park to buy 130,000 gallons of gasoline per month from Shell.

Meanwhile, Shell had decided to stop leasing service stations and directly supplying gasoline to station operators. Shell's plan was to sell the individual RSAs to oil wholesalers and offer the lessees/operators the chance to buy their stations. Thus, in September 2008, Highland Park accepted Shell's offer to purchase the Figueroa station. And, on April 10, 2009, as part of the purchase deal, Shell and Highland Park agreed to terminate the old contracts and enter into two new ones: a Mutual Termination Agreement and Release (MTAR) and a new RSA.

Under the MTAR, the parties agreed that upon close of escrow for purchase of the Figueroa station, the 2008 RSA, the retail facility lease, and all "agreements related thereto" and "relationships established thereunder" would be terminated. Attached to the MTAR was a plain-language summary of the Petroleum Marketing Practices Act prepared by the Department of Energy.

Shell and Highland Park also executed a new RSA with an expiration date of April 30, 2019.[1] As in the earlier agreement, Highland Park agreed to buy 130,000 gallons of gasoline per month from Shell. And like the earlier agreement, the 2009 RSA contained a liquidated damages clause, which provided that "in the event of the termination of this Agreement (whether due to Seller's termination for cause or Retailer's termination)" before the end of the contract term, Highland Park would be liable for liquidated damages of 3 cents per gallon for every gallon of unpurchased gasoline.

On August 3, 2009, escrow for purchase of the Figueroa station closed, the deed was transferred to Highland Park, and both the MTAR and the new RSA went into effect.

About a year later, on July 7, 2010, Shell assigned the 2009 Highland Park RSA to Anabi Oil along with about 85 other California RSAs. As part of the assignment deal, Anabi assumed Shell's obligation to pay incentives to Highland Park under the technology improvement agreement. Anabi also agreed to perform Shell's duties under the RSA "in compliance with the PMPA." From that point forward, Anabi supplied gasoline to Highland Park.

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[1] On February 1, 2010, Shell and Highland Park entered into a technology incentive program agreement that extended the RSA's expiration date to August 31, 2021.

Highland Park ran into financial problems, and on August 21, 2012, the Board of Equalization issued a notice of levy on the property and revoked Highland Park's seller's permit for failure to pay sales tax. The property was foreclosed on October 16, 2012.[2]

National Pacific Petroleum, Inc. (National Pacific) took over the Figueroa station and, on October 26, 2012, entered into a RSA to buy gas from Anabi. National Pacific promised to buy 215,000 gallons per month of gasoline and diesel through October 31, 2032. The parties also executed a side concession agreement that gave National Pacific a rebate based on the amount of gas it ordered: 2 cents per gallon on monthly orders up to 140,000 gallons, 3 cents per gallon on monthly orders between 140,000 and 170,000 gallons, and 4 cents per gallon on monthly orders above 170,000. Anabi was allowed to terminate the concession agreement upon 30 days written notice.

2. Procedure

On November 13, 2012, Anabi filed the original complaint in this case. It filed the operative first amended complaint on October 2, 2013.

The first amended complaint alleged one cause of action for breach of contract based on Highland Park's failure to buy all the gasoline required under the RSA and one cause of action for breach of personal guaranty based on Youssefzadeh's failure to pay Highland Park's debts. Alternatively, Anabi claimed that Youssefzadeh was liable as an alter ego of Highland Park.

[2] Highland Park placed its last gas order on August 16, 2012.

After a 24-day bench trial, the court entered a detailed, 31-page statement of decision on April 10, 2017. Judgment was entered for defendants on May 2, 2017. Anabi filed a timely notice of appeal on June 29, 2017.[3]

CONTENTIONS

Anabi brings a variety of challenges to the court's holdings that it didn't prove breach of contract and that Youssefzadeh's personal guaranty didn't apply. Specifically, Anabi argues the court erred as to the breach of contract claim by holding: (1) Anabi breached the contract by not seeking mediation before filing its complaint; (2) Anabi breached the covenant of good faith and fair dealing; and (3) Anabi did not prove damages because: the liquidated damages provision in its contract with Highland Park was an unenforceable penalty, it was required to mitigate its liquidated damages, the liquidated damages provision had not been triggered, and it failed to prove actual damages. Anabi also argues the court erred as to the breach of personal guaranty claim by holding: (4) the MTAR terminated Youssefzadeh's personal guaranty; and (5) the MTAR released Youssefzadeh from his obligations under the personal guaranty.

DISCUSSION

1. Rules of Appellate Review

It is "a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the

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[3] On October 25, 2017, the court awarded Youssefzadeh $321,694.06 in attorney's fees and $8,359.38 in costs. Anabi has not appealed that order.

burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment. [Citations.] 'This is not only a general principle of appellate practice but [also] an ingredient of the constitutional doctrine of reversible error.' [Citations.] 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court.' " (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609.)

A corollary principle of appellate procedure is that as long as one rationale upon which the trial court based its decision is correct, we will affirm the judgment. (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1040.) When a trial court provides multiple bases for its ruling, the appellant must demonstrate that each basis for the ruling was in error; we will sustain the ruling below if a single basis for the trial court's determination is correct. (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1237.)

2. Elements of Breach of Contract

To prevail on a breach of contract claim, the plaintiff must prove "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) A plaintiff may establish damages by proving either actual damages or the existence of contractual liquidated damages. (*Hitz v. First Interstate Bank* (1995) 38 Cal.App.4th 274, 288 (*Hitz*).)

Anabi argues the court erred by holding that the liquidated damages provision in its contract with Highland Park was an unenforceable penalty, that Anabi was required to mitigate its liquidated damages, that the liquidated damages provision had not been triggered, and that Anabi failed to prove actual damages. That is, Anabi challenges the court's finding that Anabi failed to prove its breach of contract cause of action because it did not prove damages. We address the two types of damages in turn.[4]

3. Liquidated Damages

" 'The term "liquidated damages" is used to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract.' [Citation.]" (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 521 (*McGuire*).)

For a liquidated damages provision to satisfy the damages element of a breach of contract claim, the plaintiff must prove the existence and applicability of such a clause. (*McGuire*, *supra*, 220 Cal.App.4th at p. 521.) Then, the burden shifts to the defendant to prove the clause is invalid. Under Civil Code section 1671,[5] a "provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (§ 1671, subd. (b); Com. Code, § 2718, subd. (a) [§ 1671 applies to

[4] Because we affirm based on the court's holding that Anabi failed to prove damages, we do not address Anabi's challenges to the court's other bases for ruling that it did not prove its breach of contract claim.

[5] All undesignated statutory references are to the Civil Code.

contracts for the sale of goods governed by the Commercial Code].)

In its statement of decision, the court below held that the liquidated damages clause in the RSA was never triggered. The court explained: "[T]he liquidated damages clause contained in Article 2(b) of the 2009 Retail Sales Agreement between Shell and [Highland Park] (Ex. 7) is only triggered if one party to that contract terminates the Retail Sales Agreement. However, it is undisputed that neither [Highland Park] nor Shell [nor] Anabi terminated the 2009 RSA. Therefore, the required condition has not been met, and the liquidated damages provision has not been triggered. Although Rawa Rene Anabi tried to argue that a breach by [Highland Park] was the termination, the language of the RSA does not use the term breach. A breach is different from a termination. Moreover, Craig Walker of Shell testified that the Petroleum Marketing Practices Act controls the process of terminating a dealer and prescribes the notice and grounds that a supplier must have before they can terminate a dealer. The court finds that the liquidated damages provision was not triggered, by its own plain wording." (Fn. omitted.) We agree.

3.1. The Liquidated Damages Clause

The liquidated damages clause at issue here appears in article 2 of the 2009 RSA. It provides:

> The parties agree that **in the event of the termination of this Agreement** (whether due to Seller's termination for cause or Retailer's termination) prior to Retailer purchasing the total Minimum Quantities [of gasoline] required to be purchased over the term of this Agreement, **Seller**

> **will be damaged and entitled to compensation** for such damages, which will be extremely difficult and impracticable to determine. Further, both parties wish to avoid the time and expense of protracted litigation that would result if Seller filed a lawsuit to collect its damages for breach of this Agreement. Retailer further acknowledges that other remedies available to Seller are inadequate since they would not place Seller in as good of a position [as] if Retailer [had] fully performed the Agreement. Accordingly, the parties agree that the amount of Three cents $(0.0300) per gallon multiplied by the difference between the total Minimum Quantities required to be purchased by Retailer over the term of this Agreement and the volume of Products purchased by Retailer from Seller during the term of this Agreement **prior to termination** constitutes a reasonable estimate of Seller's damages and, **within 30 days of the date of termination**, Retailer shall pay Seller such amount as liquidated damages. Interest will accrue on any amount due Seller under this article from the date of the event triggering the indebtedness to Seller at the rate of 15% per annum, or the maximum lawful rate, whichever is less. (Emphasis added.)

That is, under article 2(b), Anabi is entitled to liquidated damages of 3 cents per gallon of unpurchased gas if either party terminates the contract. As it is undisputed that Highland Park did not explicitly terminate the agreement, we turn to article 23, which explains when Anabi can terminate the contract.[6]

Under article 23, "[s]ubject to any limitations imposed by Law … Seller may terminate this Agreement for any" of more than a dozen enumerated reasons, including any "ground for which termination is provided for in this Agreement or is otherwise allowed by the PMPA or other applicable law."[7] Then, article 29 explains that, among other requirements, Anabi must provide notices to Highland Park "in writing and in compliance with the PMPA and other applicable Law."

When we read these provisions together, as we must (§ 1641), the RSA provides that if Anabi terminates the RSA, Highland Park must pay liquidated damages of 3 cents per gallon of unpurchased gasoline, which is defined as the number of gallons Highland Park was required to buy over the life of the contract minus the number of gallons Highland Park actually bought "prior to termination." Anabi may terminate the contract "[s]ubject to any limitations imposed by Law," but must notify Highland Park in writing "in compliance with the PMPA … ." Then, Highland Park must pay the liquidated damages within 30 days of the termination date.

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[6] At oral argument, Anabi suggested for the first time that Highland Park *impliedly* terminated the RSA. This argument has been forfeited. (See *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 216.) Indeed, as argued in its opening brief and reiterated in its reply brief, Anabi's position in the litigation has been that Anabi "was entitled to elect to sue [Highland Park] for damages upon occurrence of such breach and, by doing so, terminate the contract."

[7] According to the RSA, PMPA refers to "The Petroleum Marketing Practices Act as may be amended from time to time (15 U.S.C. § 2801 *et seq.*)."

The RSA's—and the court's—references to "termination" and "the PMPA" are important. "The Petroleum Marketing Practices Act (PMPA or Act) [15 U.S.C. § 2801 et seq.] limits the circumstances in which petroleum franchisors may 'terminate' a franchise or 'fail to renew' a franchise relationship. [Citation.]" (*Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC* (2010) 559 U.S. 175, 177 (*Mac's Shell*).) As we discuss below, the Act governs this contract.

3.2. The PMPA Requirements

As the United States Supreme Court explains: "Petroleum refiners and distributors supply motor fuel to the public through service stations that often are operated by independent franchisees. In the typical franchise arrangement, the franchisor leases the service-station premises to the franchisee, grants the franchisee the right to use the franchisor's trademark, and agrees to sell motor fuel to the franchisee for resale. Franchise agreements remain in effect for a stated term, after which the parties can opt to renew the franchise relationship by executing a new agreement.

"Enacted in 1978, the PMPA was a response to widespread concern over increasing numbers of allegedly unfair franchise terminations and nonrenewals in the petroleum industry. [Citation.] The Act establishes minimum federal standards governing the termination and nonrenewal of petroleum franchises. Under the Act's operative provisions, a franchisor may 'terminate' a 'franchise' during the term stated in the franchise agreement … only if the franchisor provides written notice and takes the action in question for a reason specifically recognized in the statute. 15 U.S.C. §§ 2802, 2804. Consistent with the typical franchise arrangement, a 'franchise' is defined as ‘any contract’ that authorizes a franchisee to use the franchisor’s trademark, as well as any associated agreement providing for the supply of motor fuel … .” (*Mac’s Shell*, *supra*, 559 U.S. at pp. 178–179.)

Anabi does not dispute that it is a franchisor and Highland Park is a franchisee within the meaning of the PMPA or that the RSA is subject to the PMPA.[8] Craig Walker, the witness designated by Shell to testify on its behalf as the person most knowledgeable about the RSA’s liquidated damages clause, explained that the PMPA “governs the relationship between” a “franchisor”—which includes “branded sellers” like Shell, refiners, and “random distributor[s] such as Anabi Oil”—and their franchisees, “lessee dealers and open dealers[9] that are buying branded fuel from either the refiner or the distributor. And it sets out very specific grounds by which that franchise relationship can be ended. It has to be done for cause and it has to be done for cause that’s specifically spelled out in the statute.” The PMPA, he explained, “certainly controls our process of terminating that dealer. It prescribes what the notice of termination has to state and the grounds that we have to have before we can terminate the dealer.” Thus, when Shell assigned

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[8] As relevant here, the Act defines a “franchise” as “any contract” between a distributor and a retailer, “under which a … distributor … authorizes or permits a retailer … to use, in connection with the sale … of motor fuel, a trademark which is owned or controlled … by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.” (15 U.S.C. § 2801(1)(A)(iv).)

[9] An “open dealer” is a gas station franchisee who owns his station but enters into a contract to buy gasoline from a distributor. A “lessee dealer,” on the other hand, leases a station that’s owned by the distributor.

the RSA to Anabi, the assignment agreement specifically required Anabi to fulfill all of Shell's duties under the RSA "in compliance with the PMPA."

As Walker testified, under the PMPA, a franchisor may only terminate a gas franchise before the end of the franchise agreement if: (1) the franchisor meets the Act's notification requirements (15 U.S.C. §§ 2802(a), 2804) *and* (2) the termination is for a reason described in the Act. (*Id.* at § 2802(a), (b)(1), (b)(2).)

Under the notice provisions, the franchisor must notify the franchisee of the termination in writing—usually at least 90 days before the termination date—and deliver the notification personally or by certified mail. (15 U.S.C. § 2804(a), (c)(1), (c)(2).) The notification must state the franchisor's intent to terminate the franchise, the reasons for its decision, and the termination's effective date, and must include a copy of the Department of Energy's plain language statement summarizing the PMPA's franchise protection provisions.[10] (*Id.* at § 2804(c)(3), (d); see *Mac's Shell*, *supra*, 559 U.S. at p. 193, fn. 12 [noting that if franchisor ends a franchise relationship "*without* providing the statutorily required notice … a franchisee would … have a sure-fire claim for unlawful nonrenewal"].)

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[10] Walker explained, "the PMPA summary statement"—"a plain English description" of the Act, which is prepared by the Department of Energy and explains "the dealer's rights and obligations under the PMPA"—"has to be attached to any termination that's given to a dealer under the PMPA, whether it is a unilateral termination for cause or for a mutual termination that the dealers and the oil companies agreed upon."

3.3. Anabi did not trigger the liquidated damages provision.

As discussed, under the terms of the RSA, to trigger the liquidated damages provision, Anabi had to terminate the contract. And, under both the RSA and the PMPA, to terminate the contract, Anabi had to give Highland Park written notice of termination. Rawa Anabi, co-owner of Anabi Oil, testified that Anabi had never provided Highland Park with notice of termination of the RSA. Accordingly, the liquidated damages clause was not triggered.

On appeal, Anabi contends it could invoke the liquidated damages clause without formally terminating the RSA because Highland Park repudiated the agreement and, when Anabi filed suit seeking damages, it effectively terminated the contract. Anabi cites two cases in support of this proposition: *Taylor v. Johnston* (1975) 15 Cal.3d 130 and *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94. Both are inapt because federal law preempts state law on this issue.

"The doctrine of federal preemption derives from the supremacy clause of the United States Constitution, which declares that 'the laws of the United States ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.' (U.S. Const., art. VI, § 2.) Under the supremacy clause, federal laws preempt state laws whenever Congress so intends. [Citation.]" (*People ex rel. Dept. of Transportation v. Acosta* (2009) 178 Cal.App.4th 762, 768 (*Acosta*).)

Federal preemption has been recognized in three general areas: "(1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves ' "no room" for supplementary state regulation,' or (3) where the federal and state laws 'actually conflict [ ].' [Citation.]" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567; see *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814 [" 'Since ... *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 427, "it has been settled that state law that conflicts with federal law is 'without effect.' " ' [Citations.]"].)

"Section 2806 of [the PMPA] reads: 'To the extent that any provision of this subchapter applies to the termination ... of any franchise … no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation ... with respect to termination ... of any such franchise ... unless such provision or such law or regulation is the same as the applicable provision of this subchapter.' (15 U.S.C. § 2806(a)(1).)" (*Acosta*, *supra*, 178 Cal.App.4th at p. 769.)

Accordingly, to the extent California's state contract law generally allows a party to terminate an agreement in the manner Anabi suggests (an issue we do not reach), it's clear that the federal law governing—and explicitly referenced in—*this* agreement does not so allow.

Neither of Anabi's cited authorities hold otherwise. *Taylor v. Johnston*, *supra*, 15 Cal.3d 130 involved a contract to breed racehorses. The court held there had been no actual or anticipatory breach. (*Id.* at pp. 137–141.) *Caminetti v. Pacific Mut. Life Ins. Co. supra*, 23 Cal.2d 94 involved a lawsuit against the Insurance Commissioner challenging the way he had liquidated the assets of an insurer that became insolvent during the Great Depression. (*Id.* at pp. 97–98.) Neither *Taylor* nor *Caminetti* holds that the common law of contracts in California is relevant to petroleum franchise agreements under the PMPA.[11] Nor does either case involve a contract for the sale of goods, which would ordinarily be governed by the Commercial Code.

4. Actual Damages

As discussed, to prove breach of contract, the plaintiff must prove damages. Here, because article 2(b) of the RSA was not triggered, it cannot be used to prove liquidated damages. Therefore, to prevail on its breach of contract cause of action, Anabi had to prove actual damages. (*Hitz*, *supra*, 38 Cal.App.4th at p. 288.) The court below found it failed to do so. We agree.

4.1. Standard of Review

The measure of damages suffered is a factual question for the trier of fact. (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 737–738.) Here, the court issued a comprehensive statement of decision explicating its factual findings and concluding that Anabi's evidence lacked sufficient weight and credibility to carry its burden of proof.

"We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence. [Citation.]" (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.) "Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' *and* (2) 'of such a character

[11] Nor could they so hold, as both cases predate enactment of the PMPA.

and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528, italics added; see *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769–770 [applying *In re I.W.* to failure to prove damages].) That is, the trier of fact may reject even uncontradicted testimony as long as that rejection is rational and not arbitrary. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461.) "Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor." (*Bookout*, *supra*, at p. 1486.)

4.2. Proof of Damages

"Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' [Citation.] Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' [Citation.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774.)

In this case, Anabi claimed it had been earning a 4.5-cent-per-gallon profit under its contract with Highland Park. It also claimed that though National Pacific had agreed to buy 85,000 *more* gallons of gasoline per month than Highland Park was required to buy for the same station, Anabi would make *less* money under the new deal because it had to pay National Pacific a 4-cent-per-gallon concession on the extra gas, leaving it with a net profit of only half a cent per gallon.

Anabi called only one witness to testify to these lost profits: Rawa Anabi,[12] a witness whom the court found utterly incredible.[13] The court explained:

> Mrs. Anabi could not answer questions directly or credibly. Although she managed to give direct and responsive answers to prepared questions, often leading questions, from her own attorney, she could rarely, if ever, answer responsively to any question from the defense. Instead, she quibbled with the questions from the defense, argued with defense counsel, and was repeatedly nonresponsive to the question asked. Her answers were often incoherent and unintelligible. The often-leading questions from her own counsel also undermined her credibility. She also could not explain the documents supporting her damages claim, documents supposedly created under her direction. She testified that her damages were derived from certain documents and calculations, and then would be unable to answer simple questions on the basis for the damages. Other times she could not testify what the numbers were based on, and

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[12] We refer to this witness as "Mrs. Anabi" to distinguish her from the company.

[13] At oral argument, counsel for Anabi appeared to argue that Youssefzadeh, who was called by Highland Park, testified that Anabi had suffered at least 1.5 cents per gallon in damages. To the contrary, though Youssefzadeh used Anabi's numbers as a starting point, he did so to critique them—not to concede them. His testimony on this point could not have been clearer: "I do not think they have suffered any damages."

> responded that she did not know. She was impeached by her deposition, including her admissions that she had no documents to back up her damages analysis. … Her testimony was simply not credible. In short, the Court discredits Rawa Rene Anabi's testimony on damages.

The record supports the court's assessment of this witness. For example, though the court had frequently admonished Mrs. Anabi on the issue, at one point, her answers became so argumentative and nonresponsive that the court instructed the clerk to "re-swear Mrs. Anabi so she understands she's under oath … ." Later, Mrs. Anabi's refusal to answer basic foundational questions prompted Anabi's attorney to stipulate that 7 minus 2.5 equals 4.5.

But even apart from the fundamental credibility problems with Anabi's sole damages witness, the court had other reasons to be skeptical of Anabi's claims.

First, Anabi did not present any documentary evidence to support its assertion that it had actually earned a 4.5-cent-per-gallon profit on the gasoline it sold to Highland Park—or anyone else.

Second, while Mrs. Anabi testified that Anabi had to agree to the 4-cent National Pacific concession because of "competition" and "market conditions," she did not provide any details about the asserted competition or market conditions.

Third, even taking Mrs. Anabi's testimony at face value, the court could reasonably find that the twin pillars of Anabi's damages claim—the 4.5-cent-per-gallon profit it would have earned on gas sold to Highland Park and the 4-cent-per-gallon concession it had to pay to National Pacific—could not logically coexist.

Mrs. Anabi testified repeatedly, insistently, and at great length that Anabi had to earn—and, therefore, would always set its prices to *ensure* it earned—a 4.5-cent-per-gallon profit. Yet that emphatic testimony actually supports the court's finding that the 4-cent-per-gallon concession—which, under the contract, Anabi could cancel upon 30 days notice whenever it wished—was a sham meant to inflate Anabi's damages during litigation: Given the claimed importance of the 4.5-cent profit, the court could reasonably conclude Anabi would not agree to earn a mere half-cent profit on gasoline. On the other hand, if the 4-cent concession *were* legitimate, the court could logically infer that Anabi did not actually need—or expect—to earn a 4.5-cent-per-gallon profit on the Highland Park sales. Either inference would support the conclusion that Anabi did not prove its damages with reasonable certainty. (See *Hitz*, *supra*, 38 Cal.App.4th at p. 290 ["Under the most basic rule of appellate review, we are not permitted to second-guess the trial court's factual determination as to the [plaintiff's] motivation and purpose, but are bound by that determination."].)

Fourth, Anabi's credibility on this issue was further impaired when it claimed $111,370.31 in damages to which it was plainly not entitled—$85,000 in imaging fees that Shell had promised to reimburse to Anabi and $26,370.31 in technology improvement funds that Highland Park had earned when it fulfilled a different contract.

Taken together, while Anabi argued "in conclusory fashion through Rawa Rene Anabi, that it was making 4.5 cents a gallon on its sales to [Highland Park] between 2010 and 2012 under the

2009 RSA," the court reasonably concluded it had "offer[ed] no convincing evidence" to support that claim. Accordingly, the court properly held that Anabi failed to prove the damages element of its breach of contract cause of action.

5. Personal Guaranty

As Anabi acknowledges, there must be a debt before a personal guaranty can apply. (See § 2787 ["A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor"]; *Brunswick Corp. v. Hays* (1971) 16 Cal.App.3d 134, 137–138 [contracts of guaranty are treated as suretyship obligations; thus, obligation of guarantor as surety is identical to that of principal debtor].) Because Anabi did not prove damages in this case, and, therefore, did not prove indebtedness by Highland Park, there is no basis for the personal guaranty claim against Youssefzadeh.

DISPOSITION

The judgment is affirmed. Atabak Youssefzadeh shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.